IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

INDEPENDENT COAL AND COKE COMPANY and
CARBON COUNTY LAND COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA and CARBON COUNTY,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Independent Coal and Coke Company and Carbon County Land Company, respectfully show:

This case [1] involves the validity of the title of the State of Utah to lands acquired under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107. That Act (sec. 12) granted to the State several hundred thousand acres and provided (sec. 13) that they should be

[1] The suit was instituted by the United States against Carbon County Land Company, Independent Coal and Coke Company, and Carbon County. The Court of Appeals ordered a dismissal as to Carbon County. The record is so brief (pleadings, etc.) that references to the same as an aid to the Court (*Furness, etc. v. Yang-Tsze, et al.*, 242 U. S. 430) are deemed unnecessary.

selected under the direction of the Secretary of the Interior. The State made selections and the lands were certified in 1901-1904. The State's title and right to convey are challenged by the United States.

Suit was instituted in 1924. The District Court sustained motions to dismiss and the bill was dismissed. Its decree was reversed by the Eighth Circuit Court of Appeals.

The case turns largely on a decree in another suit brought in 1907. In that suit a decree was rendered (1914) adjudging the Government to be the *equitable* owner of the lands. This was affirmed (1915) by the Eighth Circuit Court of Appeals.

The present bill alleges that during 1901-1904 the lands were certified to the State; that the State executed *contracts of sale* to Stanley B. Milner, Truth A. Milner, Harley O. Milner, and Samuel H. Gibson; that thereafter, in 1907 [1], the United States instituted suit against these parties and the Carbon County Land Company, assignee of the contracts, for the cancellation of the contracts, upon the ground that the lands were known mineral lands at the time of selection; that a decree was rendered (1914) adjudging the United States the *owner and entitled to possession*; that this decree was affirmed by the Circuit Court of Appeals in 1915; that the State was not made a party; that it was believed by the plaintiff that the State would leave to the determination of the courts the question of right between the Government and those who had misused the State's agency in acquiring title and would conform its subsequent action to that determination; that the State has

[1] The transcript alleges 1927. This is apparently a clerical error. Both of the lower courts and all parties have assumed that 1907 was intended.

not seen fit to do so, but in 1920 issued its patent to the Carbon County Land Company, the same party to which the contracts had been assigned; that in doing so the State relied upon the fact that it had not parted with the legal title at the time of the rendition of the decree.

The bill, after alleging that the Independent Coal and Coke Company claims an interest in part of the lands and asking for discovery, concludes by an averment that the lands have already been determined by the District Court and by the Circuit Court of Appeals to be mineral lands and not subject to selection; that this question is *res adjudicata;* and that title has at all times been *equitably* in the United States.

The prayer is that inasmuch as the *State* has conveyed the *legal* title the Carbon County Land Company be adjudged to hold the title in trust for and convey to the United States; that it deliver up its patents, subject only to the *mortgage taken by the State* to secure the purchase price, which mortgage, unless the State will surrender its claim, will form the subject of an *independent suit between the plaintiff and the State in the Supreme Court of the United States;* and that defendants be enjoined from setting up any claim, etc.

Four matters are thus brought into distinct prominence:

(1) The absence of the State as a party in either suit.

(2) The passing of the legal title to the State in 1901-1904.

(3) The absence of any averment that the patent of 1920 from the State to the Carbon County Land Company was *under and pursuant* to the *contracts of sale* involved in the 1907 suit or in violation of the decree in that suit.

(4) The absence of any showing *why* the Independent Coal and Coke Company should, at the instigation of the plaintiff, submit its claim to the determination of the court.

The Circuit Court of Appeals said:

> "According to the charges in this complaint, the legal title passed through the State to that company (Carbon County Land Company) *after it was finally decided that as between appellant and Carbon County Land Company* all of the lands belonged to the United States and *its* title thereto was quieted as against *that* company. *Perforce that decree* Carbon County Land Company, in accepting a patent from the State, obtained *nothing* but the bare legal title. On the facts stated it acquired no beneficial interest in the lands as *against the United States*, and the purpose of this suit is to obtain a decree that it holds that title in trust for appellant and to compel it to convey the legal title to appellant.
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> . . .
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> "If the *case stated in the bill* should be made out, it would seem clear that the relief sought should be granted, as to Carbon County Land Company, that it convey to appellant all of the lands title to which stood in its name when this suit was brought, and deliver to appellant any patent or other conveyance to it from the State; as to Independent Coal and Coke Company, that it make like conveyance of any of the lands conveyed to it, in which it acquired an interest *with notice of appellant's rights*, or without value."

The defendants contended before that Court:

(1) That inasmuch as the legal title *passed* to the State *when* the lands were certified, the State's title, although *voidable* on the ground of fraud, ripened into a good title at the end of six years; the pleadings *affirmatively* disclosing that the Government had knowledge of the fraud when it instituted the suit of 1907.

(2) That the Act of March 3, 1891, sec. 8, c. 561, 26 Stat. 1095, prescribing that suits to annul *patents* must be brought within six years, is applicable to suits to annul *certifications*.

(3) That the object of this suit is in reality to cancel the certification to the State, as much so as though a direct suit had been brought against the State.

(4) That although the decree rendered in the suit of 1907 was binding and unimpeachable, it did not prevent the acquisition afterwards from the State of a *new and later* title under a different agreement entered into long after the rendition and affirmance of that decree.

The Court of Appeals rejected the contention that the present suit is one to cancel the certification and therefore within the Act of March 3, 1891, *supra;* the Court saying that a suit to *impress a trust* is not within the Act and cannot be regarded as an attack on the *certification*.[1]

This Court, in *United States v. Whited and Wheless*, 246 U. S. 552, held that the Act of March 3, 1891, *supra*, does not bar a suit to recover damages for fraudulently inducing the Government to part with title. In the present case the decree, when rendered in conformity with the opinion of the Court of Appeals, will *disturb the title*. Its effect will be the same as *cancelling*

[1] Said the Court: " . . . . As to this suit, it is rather an *acceptance* of the Secretary's certification than an *attack* upon it."

the certification to the State. The doctrine of *United States v. Whited and Wheless, supra,* is that the *title* may not be disturbed after the expiration of the statutory period. The present suit has for its object the *disturbance of the title.* The opinion of the Court of Appeals amounts to an annihilation of the Statute.

The opinion of the Court of Appeals is predicated on one of two alternative propositions:

(1) The Court did not openly hold that the decree in the 1907 suit is binding on the State and its grantees; but this is the necessary effect of its opinion. In other words, that the question of title is *res adjudicata* as to the *State and its grantees* by virtue of that decree notwithstanding the *absence* of the *State* as a party to the suit.

(2) That although the State may have a *good* title on account of non-institution of suit within six years, the State is nevertheless powerless to convey to anyone having *knowledge* of the Government's rights. In short, that any one to whom the State may convey with *knowledge* of the decree rendered in the 1907 suit, holds the lands *in trust* for the United States. This is tantamount to saying that the State and its grantees are *bound* by that decree.

If the Court of Appeals intended, in accordance with the first proposition, to lay down the doctrine that the State's title became *res adjudicata* as to the State's *subsequent* grantees by virtue of the decree in the 1907 suit, then plainly its ruling cannot be upheld.

If that Court intended, in accordance with the second proposition, to lay down the doctrine that notwithstanding the State's title has become good by lapse of time anyone accepting a patent from it with *knowledge* of the Government's rights under the decree in the 1907 suit gets a title which the United States can take

away, then this doctrine finds no support in the decisions of this Court but is directly opposed to them.

We recognize the binding effect of the decree in the 1907 suit; but we say that when the State's title, voidable in the beginning, has ripened into a good title, the State possesses the right to convey; and this is true even though the conveyance be made to one whose contract of sale was cancelled in the 1907 suit. The decree in the 1907 suit, adjudging that as against the defendants *therein* the United States was the owner and entitled to possession, did not prevent the State, when its title became perfect, from conveying that title *even though its grantee was aware of that decree;* especially so where the conveyance was *not* made under the contracts of sale which that decree cancelled. The bill contains *no* allegation that the conveyance in 1920 from the State to the Carbon County Land Company was in *execution of the contracts of sale* which the decree in the 1907 suit cancelled and set aside. The plain inference from its allegations is that the patent of 1920 was executed pursuant to a *new* agreement.

The Court of Appeals said that this suit is in *aid* of the former decree and to obtain the *benefits* of that decree:

> "As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where *new interests arise* or where *relief of a different kind* from that obtainable under the first suit is required, and it may be filed either before or after a decree.
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> . . .
>
> And the text of both authorities leaves no doubt

that on the facts here an assignee * of part may be joined as a party with his assignor."

We say that whether or not the suit is in aid of the former decree, and whether or not the bill is a supplemental one to obtain the benefits of that decree, does not alter the fundamental fact that if the State, by reason of not being a party to that suit, *ultimately* obtains a *good* title by lapse of time, the decree in the 1907 suit does not prevent the State from conveying that title, even to one whose contract of sale was cancelled in that suit. This is not flouting that decree. It is merely asserting that if a party to that suit gets a conveyance from the State *after* the latter's title has become perfect by reason of the Government's failure to bring the State into court, the decree in the 1907 suit is not *res adjudicata* as to this *newly-acquired title*.

The decree of the Court of Appeals is in effect final. True the defendants are given leave to answer, but the opinion says that *if* the case *stated in the bill* should be made out the Government is entitled to prevail. The only defense open to the defendants is presented on this record.

Finally, the bill contains a statement that unless the State surrenders its claim the Government will file *an original suit in this Court against the State* on account of the mortgage given to secure the purchase price. The Court of Appeals does not in so many words say that the State could not have conveyed to *someone else*, but if its opinion is to be interpreted as meaning that the State, although at liberty to convey to *others*, could

* Meaning apparently the Independent Coal and Coke Company.

not convey to any of the *defendants* in the 1907 suit, this means that in a suit like the present one the United States would be defeated *if* conveyance had been made to *others*, but is entitled to prevail here *because* the State has conveyed to a party to the 1907 suit. If the United States can, in this indirect way, strike down the State's title, the strange incongruity is presented of the State getting a good or a bad mortgage dependent on the party to whom it conveys. If the United States is going to bring an original suit against the State in this Court necessarily the same questions involved in this suit will be involved in that.

The reasons why the writ should issue are:

(1) The holding of the Court of Appeals that the Act of March 3, 1891, *supra*, prescribing a six-year period of limitation, can be circumvented by a suit to impress a trust, is probably in conflict with applicable decisions of this Court. In any event this important question of federal law should be settled.

(2) If this Court should disagree with the above holding the question will then arise whether a suit to cancel a certification as distinguished from a patent is barred by the Act mentioned. The holding of the Court of Appeals that the statute does not embrace a suit to impress a trust made a ruling on this matter unnecessary. The Government contends that the remarks in *United States v. Winona and St. Peter R. Co.*, 165 U. S. 463, are *dicta*. This important question of federal law should be settled.

(3) The holding of the Court of Appeals that a decree adjudicating ownership prevents a party from thereafter setting up a *newly* acquired title is in conflict with applicable decisions of this Court.

(4) If an original bill is filed in this Court by the Government to adjudicate the mortgage of the State unless the latter renounces, that suit will necessarily involve the same questions of title. The possibility of conflicting adjudications is apparent.

The petitioners accordingly pray that this Court grant certiorari to the Eighth Circuit Court of Appeals requiring the record in this case to be brought to this Court for such proceedings as may be proper.

WILLIAM D. RITER,
Attorney for Independent Coal and Coke Company.

FRANK K. NEBEKER,
Attorney for Carbon County Land Company.

SUPPORTING BRIEF.

A suit to cancel a certification is a suit to cancel a patent within the meaning of the Act of March 3, 1891, sec. 8, c. 561, 26 Stat. 1095, prescribing a six-year period.

United States v. Winona & St. Peter R. Co., 165 U. S. 463.

Cole v. State of Washington, 37 L. D. 387.

Cf. Stockley v. United States, 260 U. S. 532.

The statute is no bar where the Government brings suit to protect the rights of third parties. *United States v. New Orleans Pacific Ry.*, 248 U. S. 507; *Cramer v. United States*, 261 U. S. 219. Nor where the suit is to declare a forfeiture because of breach of a condition subsequent. *Kern River Company v. United States*, 257 U. S. 147. But this suit is not of that character.

A suit to impress a trust and compel a conveyance is a disturbance of the title. A suit which has for its object the disturbance of the title is barred if not begun within the statutory period.

United States v. Whited and Wheless, 246 U. S. 552.

Cf. United States v. Bellingham Bay Improvement Co., 6 Fed. (2d) 102.

The opinion of the Court of Appeals amounts to an annihilation of the statute. It cannot be thus stricken down by resorting to the device of impressing a trust.

Elmendorf v. Taylor, 10 Wheat. 176.
Miller v. McIntyre, 6 Pet. 66.
Beaubien v. Beaubien, 23 How. 207.

The decree rendered in the 1907 suit is obviously not binding on the State and its subsequent grantees.

Brandon v. Ard, 211 U. S. 11, *et passim*.

This Court has with emphasis said that a decree rendered in a suit brought against a grantor *after* he has parted with title is not binding on the grantee. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464. The facts in the present case render this doctrine equally applicable.

A decree can be res adjudicata only as to matters actually decided or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

Obviously a title acquired after the rendition of a decree, such as title under adverse occupancy begun after the decree, could not possibly be adjudicated by such decree. The title acquired by the Carbon County Land Company in 1920 could not have been adjudicated in the 1907 suit for the title was not then in existence.

This Court has distinctly recognized that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a newly acquired title.

Barrows v. Kindred, 4 Wall. 399.
Merryman v. Bourne, 9 Wall. 592.

United States v. Southern Pacific R. R. Co., 223 U. S. 565.

Under these cases the Carbon County Land Company, although a party to the 1907 suit, was within its rights in acquiring a new title from the State in 1920.

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Attorney for Independent Coal and Coke Company.
FRANK K. NEBEKER,
Attorney for Carbon County Land Company.

SUBJECT INDEX

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[redacted]

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

[redacted]

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SUBJECT INDEX OF BRIEF.

CERTIORARI.

Question involved: Sufficiency of Complaint.

I.

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II.

MOTION OF DEFENDANTS TO DISMISS AND PROCEEDINGS IN LOWER COURTS.

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In the Supreme Court of the United States

October Term, 1926

INDEPENDENT COAL AND COKE COMPANY and CARBON COUNTY LAND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA and CARBON COUNTY,

Respondents.

BRIEF OF INDEPENDENT COAL AND COKE COMPANY ON WRIT OF CERTIORARI.

STATEMENT.

This Court has issued its writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of the United States District Court for the District of Utah.

The United States of America filed its bill in equity on May 16, 1924 in the United States District Court for the District of Utah, instituting the action which resulted in the judgment of the District Court. That judgment was based upon the complaint and the defendants' motions to dismiss, and the questions involved in this review relate entirely to the sufficiency of the complaint.

It is, therefore, important that the contents of the complaint should be fully stated. That complaint alleges:

That during the years 1901 to 1904 there was certified to the State of Utah, under certain grants made to the State by the Act of July 16, 1894, certain described lands, and that the State of Utah executed contracts of sale to said lands to Stanley B. Milner, Truth A. Milner, Harley O. Milner and Samuel H. Gibson.

That in the month of January, 1907, a suit was instituted in the United States District Court for the District of Utah against said individuals and the Carbon County Land Com-

pany, as assignee of said individuals "for the cancellation of said contracts of sale upon the ground that said lands were mineral lands and were known to be such at the time of their selection by the State; that said suit was tried on the merits, testimony was taken," and on June 8, 1914, a decree was entered in the District Court of the United States for the District of Utah cancelling said contracts and adjudging that the United States of America was the true and lawful owner of the said lands and quieting the title of the United States to said lands as against the said defendants (R. 2-4). (This decree is set out in *haec verba.*)

It is further alleged that this decision was affirmed on appeal by the Circuit Court of Appeals on November 15, 1915, (See 228 Fed. 431) and a copy of the opinion of the Circuit Court of Appeals is attached to the complaint as an exhibit and made a part of the bill (R. 4).

The complaint then alleges (P. 5, R. 4) that the State of Utah was not made a party to said suit, "and it was believed by the plaintiff that the State would leave to the determination of the Courts, the questions of right between the Government and those who had misused the agency of the State, in acquiring title to the lands, and conform its subsequent action to that determination." (See 138 U. S. 514).

The complaint further alleges (P. 6) that the State of Utah has not seen fit to conform its subsequent action to the determination of the Courts, but, on the contrary, on February 10, 1920, the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the before mentioned suit.

Paragraph 7 of the complaint reads as follows:

> "The Independent Coal & Coke Company, a corporation, claims an interest in Section three (3) and the North half (½) of Section ten (10) in Township thirteen (13) South, Range ten (10) East, the full nature and extent of which is unknown to plaintiff, and in respect of which a full discovery is asked of that defendant." (R. 4).

This is the only paragraph that makes any charge against the Independent Coal and Coke Company.

Paragraph 8 alleges that Carbon County is made a defendant for the reason that it claims a part of said land under a purported tax sale in the year 1921. Plaintiff avers that the lands, being property of the United States, were not subject to taxation.

Paragraph 9 alleges:

> "The plaintiff avers that said lands have already been determined to be mineral lands and as such not subject to selection by the State, both by the decision of this Court and the Circuit Court of Appeals, and this question is, therefore, *res judicata*." (R. 5).

Paragraph 10 reads:

> "The plaintiff further avers that at all times the title to said lands has been equitably in the United States."

The prayer of the complaint reads as follows:

> "Wherefore, and now that the State of Utah has conveyed the legal title to said lands to the said defendant, Carbon County Land Company, the plaintiff prays that the defendant be adjudged and decreed to hold whatever title they have to the said lands in trust for the plaintiff, and to convey the same to the plaintiff, and deliver to the plaintiff any patent or deeds of the said lands in their possession, subject only to the mortgage taken by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States; and that the defendants be restrained and enjoined from hereafter setting up any claim of title to said lands, or any part thereof, or in any manner inter-meddling therewith, or in removing any coal or other product therefrom; and may it please Your Honor to grant unto the plaintiff a Writ of Subpœna to be directed to the said Carbon County Land Company, the Independent Coal and Coke Company, and Carbon County thereby commanding them at a certain time and under certain penalty therein to be limited, personally to appear before this Court and then and there full, true, direct and perfect answer make to all and singular the premises,

but not under oath, answer under oath being hereby especially waived, and further to stand to perform and abide by such further order, direction and decree herein, as to this Honorable Court shall seem agreeable to equity and good conscience." (R. 5).

To this complaint each of the defendants, Carbon County Land Company, Independent Coal and Coke Company and Carbon County made two motions: One to strike the allegations contained in Paragraph 5 of the bill and the allegations contained in Paragraph 9, and the other to dismiss the complaint on two grounds: (1) That said bill of complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. (2) That it affirmatively appears from the face of the complaint that if any cause of action is stated in favor of the plaintiff and against the defendant, that more than six years have intervened between the time said cause of action accrued to the plaintiff and the commencement of this action, and for that reason said cause of action is barred by the statute of limitations, made and enacted by the Federal Congress of the United States Government controlling and governing such causes of action as are attempted to be stated in the bill of complaint; said Federal Statute being Section 8 of the Act of March 3, 1891, Chapter 561.

The United States District Court sustained the motions to dismiss on December 17, 1924, and gave to the plaintiff thirty days within which to amend. The plaintiff did not amend and the decree dismissing the bill with prejudice was entered in the United States District Court on January 21, 1925. Thereafter, the Circuit Court of Appeals reversed said judgment (R. 35-36).

The Petitioner, Independent Coal and Coke Company, contends:

1. That the complaint does not state facts sufficient to constitute a cause of action as against it in favor of the Government.

2. That the legal title to the land involved passed to the State when the lands were certified, and that the State's title, even assuming it to be voidable on the ground of fraud, ripened into a good title at the end of six years after the Government had knowledge of the fraud, if any existed; that it must be conclusively presumed that the Government had knowledge of this fraud when it instituted the suit of 1907.

3. That the Act of March 3, 1891, (Sec. 8, Chapter 561, 26 Stat. 1095) prescribing that suits to annul patents must be brought within six years, is applicable to suits to annul certifications; that certifications and patents are synonymous within the meaning of this statute. (Winona case).

4. That the object of this suit is in reality to cancel the certification to the State, as much so as though a direct suit had been brought against the State.

5. That neither the State nor its successors in interest are precluded from invoking the statute of limitations by the claim of the Government that the State and its grantees are constructive trustees; said State and its grantees would be trustees, if at all, against their wills and without their consent, and the statute of limitations functions to the same extent as it would function if it were the direct purpose of the action to vacate or annul the patent.

6. That though the decree rendered in the suit of 1907 was binding and unimpeachable as to the parties to that suit and their privies, it did not prevent the acquisition afterwards from the State of a *new and later* title under a different agreement entered into long after the rendition and affirmance of that decree.

7. That the bill of complaint in this action is an original one and not, in any sense, supplemental; but, even if considered supplemental in its nature, still this Court may consider intervening changes of circumstances affecting the justice of enforcing the decree as rendered.

ARGUMENT.

I. *The Complaint Does Not State Facts Sufficient to Constitute a Cause of Action Against the Independent Coal and Coke Company and in Favor of the Government.*

The Circuit Court of Appeals, in its opinion in the case at bar, said:

> "The suit is in aid of the former decree, to obtain the benefits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root vs.

Woolworth, 150 U. S. 401; Shields vs. Thomas, 18 How. 253, 262; Thompson vs. Maxwell, 95 U. S. 391, 399; Story's Equity Pleadings, Secs. 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleading says (p. 74):

"'But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * *' (75). But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill.'

"The same authority, on page 98, in reference to bills, not original, to carry on decree into effect, says:

"'The necessity for this kind of bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * * * it may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer.'

"And the text of both authorities leaves no doubt that on the facts here an assignee of part may be joined as a party with his assignor."

This Petitioner submits that said Circuit Court of Appeals misapprehended the nature of the case before it, not only as to this *particular petitioner*, but as to *all* of the defendants.

In the suit of 1907 the Government sought to, and did, set aside certain contracts which the Milners and their associates had obtained from the State of Utah. In those contracts said individuals had agreed to pay for the lands, the price of $1.50 per acre, payable in ten annual installments (R. 12); the applications to purchase showed that the lands were of a non-mineral character (R. 13); the State of Utah was not, in any sense, a party to that suit of 1907; and the title held by the State, if title it had, was not affected by that suit of 1907, or the decree entered therein. The subject mat-

ter of that suit was the contracts obtained by the Milners and their associates from the State.

This suit is in direct contrast with the suit of 1907. This suit is based upon the assumption of fact that the State has "conveyed the legal title to said land" (see prayer of complaint) to the defendants involved in this suit and the Government seeks to re-obtain that title which the State obtained by the certifications. This suit is to establish a trust and have the grantees of the State ordered to convey to the Government the title to the lands which the State has had since the dates of certifications in 1901 and 1904. The subject matter of this suit is the title that was conveyed by the Government to the State by those certifications; that subject matter was unaffected by the suit of 1907. It could not have been affected, because the State was not a party to that suit.

If the State of Utah had conveyed this land to an entire stranger to the suit of 1907, the questions involved would be identical with those which are presented by this record.

It is admitted by the Bill of Complaint in this action that the title of the State of Utah was not litigated in the suit of 1907, and it is admitted in the Bill of Complaint that the Carbon County Land Company claims as a grantee of the State holding whatever title the State had to convey, not by reason of the contracts which were annulled in the suit of 1907, but by reason of *a new and independent transaction* which took place in 1920 between the State of Utah and the Carbon County Land Company.

The mere fact that the Carbon County Land Company was the defendant in the suit of 1907 cannot alter the situation, it is submitted, in the slightest particular.

We assume that it will not be contended that the Carbon County Land Company could not acquire these lands in some *new and independent* transaction; that the transaction was new and independent, is clear from the record in this case and from the Bill of Complaint.

As to the defendant, Independent Coal and Coke Company, there is not one word in the Bill of Complaint in this action which shows or tends to show, that the Independent Coal and Coke Company derived its title either from the Carbon County Land Company or from the State of Utah.

The Bill of Complaint is silent upon the subject of *privity*. The Independent Coal and Coke Company was not a party

to the suit of 1907. The only thing that is alleged in the Bill as against the Independent Coal and Coke Company is that it claims an interest in Section 3 and the North half of Section 10, the full nature and extent of which is unknown to the plaintiff. (Par. 7, R 4.)

The Circuit Court of Appeals, in its Opinion, has assumed a fact *not alleged in the Complaint*, namely, that the Independent Coal and Coke Company is an assignee of the Carbon County Land Company. The allegations of the Government, as against the Independent Coal and Coke Company, are not sufficient to entitle the Government to any relief. They certainly do not show that the Independent Coal and Coke Company is a constructive trustee.

The Bill of Complaint is not a good bill of peace against the Independent Coal and Coke Company. Neither is it sufficient as a suit to quiet title. No fact is alleged which shows the *invalidity* or even the *adverse* character of the Independent Coal and Coke Company's claim to an interest in the land involved or in any part of that land. It is true that the Government says in its Bill of Complaint (P. 9) that the lands have been determined to be mineral lands, and as such not subject to selection by the State, and that this question is therefore res judicata (R. 5).

We may assume, for the purpose of argument, that the mineral character of the lands was determined by the decree entered in the suit of 1907, but that did not affect the State's interest in the land because the State was not a party to that suit and could not have been made a party because the State could be sued only in the United States Supreme Court.

How, then, can it be said that the question is res judicata *of* anything in the case at bar?

The decree entered in the suit of 1907 could only adjudicate the matters litigated as to the persons who were *parties* to that suit, or as to *persons* claiming under such *parties*. The State of Utah was not a party; the Independent Coal and Coke Company was not a party; and no allegation can be found in the Complaint from which the inference can be drawn that the Independent Coal and Coke Company was in *privity* with any party.

It may be said that the motion filed by the State of Utah in this Court, with its accompanying suggestions, shows that the Independent Coal and Coke Company acquired its interest

in the lands from the State of Utah through the Carbon County Land Company, but even that acquisition does not bring the Independent Coal and Coke Company into privity with the decree entered in the suit of 1907. Assuming that the suggestion of the State showing this fact *may supply the want of allegation* in the Complaint in the case at bar, still we find that the Carbon County Land Company was engaged in a new transaction with the State and as a result of that new transaction it acquired these lands and pursuant to that acquisition it conveyed 1120 acres to the Independent Coal and Coke Company.

It is submitted that such a transaction is not, in any manner, affected by the decree made and entered in the suit of 1907.

If the decree in that suit is res judicata of all the matters and things involved in this suit, then the necessity for this suit does not appear.

CONTENTION NO. 2

The Legal Title to the Land Involved Passed to the State when Lands were Certified, and the State's Title, even Assuming it to have been Voidable on the Ground of Fraud, Ripened into a Good Title at the End of 6 Years After the Government had Knowledge of the Fraud, if any Existed: That it must be Conclusively Presumed that the Government had Knowledge of this Fraud When it Instituted the Suit of 1907.

The Act of March 3, 1891, reads as follows: Section 8.

> "Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (26 Stat. 1099)."

In the case at bar the United States Circuit Court of Appeals said:

> "We think a mere reading of the bill demonstrates that view is a misconception. As to this suit, it is rather an acceptance of the Secretary's certification than an attack upon it. The Act of March 3,

> 1891, provides that suits to vacate and annul patents shall only be brought within six years after the date of the issuance of such patents. This suit was not brought to vacate and annul the Secretary's certificate. That is no part of its purpose. No such relief is sought. We think the statute relied on has no application to this case." (9 Fed. 2d. 517-518).

From this quotation it is plain that the Court of Appeals refused to apply the Act of March 3, 1891, because the Government in this suit undertook to have the defendants declared *constructive trustees*.

It is submitted on the part of the defendants that the Court of Appeals was in error when it held that the effect of the Act of March 3, 1891, could be avoided by bringing a suit to establish a constructive trust instead of by bringing the suit to vacate or annul a patent or a certificate.

These defendants are trustees, if at all, against their wills and without their consent. Under such circumstances the statute of limitations functions to the same extent as it would function if it were the direct purpose of the action to vacate or annul the patent. Neither the State nor its grantees can be precluded from invoking the statute of limitations by the fact that said State and its grantees are claimed to be constructive trustees.

Newsome v. Board, 103 Ind. 526; 3 NE. 162.

This case was decided by the Supreme Court of Indiana, November 4, 1885. Mr. Justice Elliott rendered the opinion. The syllabi reads as follows:

> "It is only to pure or direct trusts that the rule preventing the defense of the statute of limitations applies, and in cases where the jurisdiction of courts of equity and courts of law is concurrant, the statute of limitations will run."

In the course of Opinion he says:

> "It would certainly be a strange rule that would make the operation of the statute depend simply upon the character of the remedy adopted or the nature of the forum chosen and the law is not subject to the reproach of sacrificing a substantial right to the mere form of the remedy selected by the complainant."

This Court, from an early date, has applied the statute of limitations to implied or constructive trusts, and such application of the statute to such trusts cannot be avoided, either on principle or on authority.

Elmendorf v. Taylor, 10 Wheaton, 152; 6 L. Ed. 289

decided by the Supreme Court of the United States in 1825. Mr. Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, 'strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who are not permitted to do anything adverse to it.' They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

Speidel v. Henrica, 120 U. S. 377; 30 L. Ed. 718 decided by this Court in 1886. In the opinion of Mr. Justice Gray it is said:

> "In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law." (Citing authorities.)

Stillwater Railroad Co. v. Stillwater, 66 Minn. 178; 68 N. W. 837.

decided by the Supreme Court of Minnesota on November 9, 1896. In this case the Supreme Court of Minnesota was construing the Statutes of Limitations of that state and their application to the cause before the Court. It said:

> "This statute, like the equity rule which it follows, applies only to express, technical, and continuing trusts, of the kind which were cognizable exclusively in a court of equity, and of which the cases of Smith v. Glover, 44 Minn. 260, 46 N. W. 406, and Donahue v. Quackenbush (Minn.) 64 N. W. 141, relied on by the plaintiff, are examples. It has no application to

> cases of implied trusts and those which the law forces on a party. In such cases, of which the case at bar is an example, the statute of limitations runs from the time the act was done by which the party became chargeable as trustee by implication; that is, from the time when the cestui que trust could have enforced his right of suit. 'If the statute were not permitted to operate when an implied trust exists, the exceptions would be endless, as in fact every case of deposit or bailment in a certain sense creates a trust, and the instances in which an implied trust may be raised are almost innumerable.' 2 Wood Lim. Sec. 200." (Citing authorities.)

Miller v. McIntyre, 6 Peters, 66; 8 L. Ed. 320.

decided by this Court in 1832. Mr. Justice M'Lean said:

> "From the above authorities it appears that the rule is well settled, both in England and in this country, that effect will be given to the statute of limitations in equity the same as at law."

Beaubein v. Beaubein, 23 How. 207; 16 L. Ed. 190.

decided by this Court in 1859. Mr. Justice Nelson said:

> "The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations." (Citing authorities.)

Detroit Trust Co. v. Goodrich, 176 Mich. 168; 141 N. W. 882; Ann. Cases 1915-A, 821.

decided by Michigan Supreme Court May 28, 1913. After stating the rule that express trusts are not within the Statute of Limitations, the Court said:

> "But a lapse of time is as complete a bar to a constructive or implied trust in equity as at law unless there has been a fraudulent concealment of the cause of action." (Citing authorities.)

Carroll v. Greene, 92 U. S. 509; 23 L. Ed. 738

decided by this Court in 1875.

In that case this Court looked at the substance of the action rather than its form and applied the statute to a case stated in a bill in equity.

What is the substance of this action, if not to destroy the title of the State and its grantees?

Whenever a grantor seeks to have a fraudulent grantee declared a constructive trustee, he must allege and prove all of the facts that would be essential to the annulment or vacation of the grant made by him to such grantee. Equity simply affords him an additional remedy and permits him to have such grantee declared a constructive trustee, but before such a declaration can be made by any court of equity it must annul and vacate the grant made. If the relief prayed for in this bill is to be allowed by the Courts, the granting of that relief necessarily vacates and annuls the certificates. The rights of the parties, it is submitted, cannot be affected by the Government availing itself of the remedy which results in declaring the State and its grantees constructive trustees. In the language of the decisions such an evasion or annihilation of the statute would be a reproach to our system of jurisprudence.

DOES THE STATUTE APPLY?

It appears from the record that the certifications were made by the Secretary of Interior in the years 1901 and 1904; that in 1907 the Government brought a suit in the United States Court to annul the *contracts* entered into by the Milners with the State of Utah upon the ground of fraud. It ought to be accepted that the Government had knowledge of the fraud at the time this suit was instituted in 1907. This suit resulted in the judgment of 1914, which was affirmed by the Circuit Court of Appeals in 1915, and the *contracts* entered into by the Milners with the State of Utah ceased to exist. The State of Utah was not a party to that suit. *No action was taken by the Government to annul or re-obtain the legal title held by the State.* On February 10, 1920, the State conveyed those lands to the Carbon County Land Company by virtue of an entirely *new and independent transaction.* The State now holds a mortgage on those lands for $556,428.

The present action was not instituted by the Government until May 16, 1924. Twenty years had run from the date of the last certification until the commencement of this suit. Ap-

proximately seventeen years had run between the time of the commencement of the suit of 1907 and the commencement of the present suit in 1924. Approximately ten years had run between the decree of the District Court in 1914 and the commencement of this suit. It is submitted that Section 8 of the Act of March 3, 1891, applies to the certification with the same force that it would apply to a formal patent. The bringing of this suit is a confession on the part of the Government that the title was held by the State until February 10, 1920. The statement contained in the prayer of the bill in this suit that an action will be brought against the State is a conclusive concession on the part of the Government that the State has an interest in this land. The statute says that:

> "Suits to vacate and annul patents * * * shall only be brought within six years after the date of the issuance of such patents."

If these certifications made by the Government to the State have the same legal effect as patents, then it is submitted that this suit is barred by Section 8 of the Act of March 3, 1891.

> United States v. Winona Railroad Co., 67 Fed. 948.

decided by the Circuit Court of Appeals, Eighth Circuit, May 6, 1895. In that case Mr. Circuit Judge Sanborn, speaking for himself and Circuit Judges Thayer and Caldwell, said:

> "The certificates were evidence that the officers of the Land Department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy and their legal effect was the same as though patents to the State had been issued for the benefit of that Company."

And again:

> "A certificate or patent is the record evidence of the judgment of this tribunal and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department it is like the judgment of other special tribunals vested with judicial powers impervious to collateral attack."

The entire opinion shows that the words "patent" and "certificate" are in law synonomous. It was held by the Circuit Court of Appeals in the Winona case above cited that the certificates of the Land Department were not absolutely void but merely voidable and that they conveyed the legal title to the State and its grantees.

It appears that the case decided by the Eighth Circuit was appealed to this Court.

> United States v. Winona Railroad Co. 165 U. S. 463; 41 L. Ed. 789.

decided on February 15, 1897. In the course of his opinion, speaking for a unanimous court, Mr. Justice Brewer pointed out that by Section 1 and 2 of the Act of 1887, the Attorney General was authorized to commence proceedings to cancel all patents, certifications or other evidences of title found to have been erroneously issued in the adjustment of railroad land grants; and he further says in substance if these two sections of the Act of 1887 were all the legislation of Congress bearing upon the subject, then lapse of time would not be a bar as against the Government to the maintenance of such actions. He then points out that on March 3, 1891, Congress enacted the statute now under consideration, providing that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued, such suits should only be brought within six years after the date of issue.

The learned Justice appreciated the fact that the appellees in the Winona case could not avail themselves of the limitations contained in the Act of 1891 because the suit was instituted by the Government before the expiration of the time prescribed in the statute. He then refers to the fact that on March 2, 1896 (which was after the decision of the Circuit Court of Appeals of the Eighth Circuit), Congress passed a further Act (29 Stat. at Large 42, Chapter 39), extending the period of limitations, but following that extension with this provision:

> "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled but the right and title of such purchaser is hereby confirmed."

He says:

> "It is true that this Act was passed after the commencement of this suit—indeed, after the decision of the Court of Appeals—but it is none the less an Act to be considered."

And again he says:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896 to confirm the title in this case passed by certification to the State."

It not only declares that no patents to any lands held by a bona fide purchaser shall be vacated or annulled, but it confirms the title of such purchasers.

This decision of this Court applies the identical legislation, for the legislation of 1896 was but a complement to the Act of 1891, to *certifications* as well as to patents. If there had been any legal distinction between the two words, then it is submitted that this Court could not have applied the sentence quoted from the Act of 1896, because it was undisputed that the appellees had obtained whatever title they had by means of certifications of the Land Department to the State of Minnesota.

Congress could have had no purpose in making a distinction between a formal patent and a certification. The one conveys the title to the land of the Government as effectively as the other. The mere fact that one is a trifle more formal than the other does not in any manner justify a distinction such as is attempted in the case at bar.

Langdeau v. Hanes, 21 Wallace, 521; 22 L. Ed. 606,

decided on February 15, 1875. In that case Mr. Justice Field used the following language:

> "In the legislation of Congress a patent has a double operation. It is a conveyance by the Government when the Government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evi-

> dence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the Government."

And, again, he says:

> "The whole error of the plaintiff arises from his theory that the fee to the land in controversy passed to the United States by the cession from Virginia, and that a patent was essential to its transfer to the claimants."

Applying the definition of Mr. Justice Field to Section 8 of the Act of March 3, 1891, and it must be clear that Congress used the word "patent" in its broadest sense. Surely Congress was not referring to any mere written document or instrument bearing the name "patent." The legislation was passed for the purpose of permitting the Government to re-obtain its title to lands which had been erroneously or wrongfully granted, and at the same time it was undertaking to accomplish that "benign purpose" (quoting from J. Brewer in Winona case) of giving security and certainty of title to its citizens who might invest in lands previously owned by it. It was fixing a time when no mere errors or irregularities or alleged frauds or misrepresentations should be open for consideration to disturb the holders of the title to land.

It is not believed that anyone can attribute to Congress the purpose of merely striking at the *written* document in its aspect as evidence of a grant. This legislation struck at the grant itself, and that grant could have been made either by means of a certification or by means of a formal instrument signed by the President. As was said by this Court in

Shaw v. Kellogg, 170 U. S. 312; 42 L. Ed. 1050

> "There is no magic in the word 'patent' or in the instrument which it defines."

This was the language of Mr. Justice Brewer, used in 1898. It is persuasive as to the effect of the opinion of the same justice rendered in the Winona case, upon which these

petitioners rely. The Land Department of the United States has construed the Winona case according to our contention.

Cole v. State of Washington, 37 L. D. 387

decided by First Assistant Secretary Pierce on January 8, 1909.

It was there held:

> "The certification of lands under a grant that does not require a patent is equivalent to a patent and the validity of such certification can be questioned only in the courts, subject to the same limitations with respect to time in which suits may be instituted as Government suits to cancel patents."

We readily concede that the statute under consideration is no bar where the Government brings a suit to protect the rights of third parties, nor where it brings a suit to declare a forfeiture because of a breach of a condition subsequent.

United States v. New Orleans Pacific Railway Co., 248 U. S. 507
Cramer v. United States, 261 U. S. 219
Kern River Co. v. United States, 257 U. S. 147
United States v. LaRoque, 198 Fed. 645

(Decided by the Circuit Court of Appeals, Eighth Circuit, July 8, 1912.) It is plain from this decision that what are referred to in some of the cases cited as "trust patents" do not come within the terms of Section 8 of the Act of March 3, 1891.

Lands, the legal title to which remains in the United States in trust for Indians or other wards of the Government, are exempted from the operation of this Act, but lands which have been granted by the Government to individuals with the intention of conveying title to the grantees, with the intention of surrendering the absolute ownership of the Government so that such lands can be sold by the grantee and purchased by other persons, come squarely and directly within the purpose of the legislation of 1887, 1891 and 1896. If a distinction is to be made in the application of this statute as between lands granted by means of a certificate and lands granted by means of a formal patent, signed by the President,

then, indeed, Congress cured only a portion of the evil at which it struck in the legislation referred to. It is not believed that this Court can attribute to the Federal Congress any such an intent.

In the case of Shaw v. Kellogg, 170 U. S. 312, this Court said, in reference to legislative grants, quoting from Winona v. Barden, 113 U. S. 618:

> "They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instrument of private conveyance To ascertain that intent we must look into the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

And again:

> "It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future."

And again:

> "But, it is said, no patent was issued in this case, and therefore the holding in the Barden case, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. *There is no magic in the word 'patent' or in the instrument which the word defines.* By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, *the same result* follows as though a formal patent were issued."

And again:

> "In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in fact refused, and when the title passed the same as though

> a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land."

It occurs to the writer of this brief that in this legislation of which Section 8 of the Act of March 3, 1891, is a part, Congress was undertaking to give relief as against the almost intolerable condition which existed in the public land states. It attempted to fix a time when suits could be brought by the Government for the purpose of re-obtaining title to lands which had passed from the Government. Any suit which had for its object the disturbance of that title on the ground of fraud or irregularity was barred, if not begun within the statutory period, so that the Government could not re-obtain the title. It was not a matter of any importance so far as the evil was concerned, whether the title had passed from the Government by an instrument signed by the President or by means of an instrument which was certified by the Secretary of the Interior. The evil in one case was as great as the evil in the other, and it does not seem to be fair to attribute to Congress the intent to correct only a part of this evil.

It is therefore submitted that the opinion of the Circuit Court of Appeals amounts to an annihilation of the statute. So far as that opinion is concerned it could as well be applied to a formal patent as it could be to a certification. It suggests an additional way of avoiding the statute for, if the contentions of the Government in the case at bar are sound, the statute can be avoided by granting land by means of a certificate, or if that land is granted by means of a formal patent, then by bringing a suit to have the fraudulent grantee or his successors in interest declared constructive trustees.

In the late case of

> United States v. Oregon Lumber Co., 260 U. S. 290; 67 L. Ed. 261

this Court said:

> "The defense of the Statute of Limitations is not technical but substantial and meritorious."

3 Holdsworth P. 94, see appendix.

Mr. Holdsworth has said, in discussing the subject of seisin, that it gives the best title known to English law and English lawyers. Now, title rests upon seisin. If anyone is

possessed of a piece of land he is entitled to hold it until someone can take it away from him by means of the strength of the latters own title. In this Oregon Lumber case this Court held:

> "The United States may either disaffirm a patent for public lands acquired by fraud under the Timber and Stone Act or it may affirm the transaction and recover damages for fraud, but it cannot do both."

And in the case of

> United States v. Whited, 246 U. S. 552; 62 L. Ed. 879

This Court, speaking by Mr. Justice Clark, held that the Statute of Limitations barred only one of these remedies; that the United States had two remedies, one to annul the patent and the other to affirm the patent and recover the value of the land.

If the opinion of the Circuit Court of Appeals is to be sustained, one would come to the conclusion that the United States has three remedies—one to annul the patent—which may be barred in six years after the issuance of the patent; the other to affirm the patent and sue for the value of the land against which no statute appears to run, *and the other to affirm the patent or certificate and sue to have the holder of the title declared to be the Government's constructive trustee.* And to these may be added that if this title has been transferred through the agency of the Secretary of the Interior, by means of a certificate, instead of through the agency of the President by means of a formal patent, then no Statute of Limitations exists, and the ownership of all lands thus acquired by means of certifications is subject to an attack by the Government, without limitation as to time or circumstance. (Such is the opinion of Court of Appeals.)

For reasons of public policy such a construction of the legislation under consideration should be avoided, if it can be without doing any violence to settled principles.

In the brief of the Government filed in this court in opposition to the petitioners' application for a writ of certiorari, it was said that the matters involved in the suit of 1907 were res adjudicata; that the former adjudication of June 8, 1914, determined, as between the United States and the as-

signees of the State, that the State had obtained no title by the certification, and that the United States was the owner of the land. If this statement made by counsel for the Government is true, then it would seem that this entire suit of 1924 was wholly unnecessary. If the whole matter was adjudicated by the decree of 1914, if that took away the title of the State, *then why is this suit being litigated?*

In the case of

Williams v. United States, 138 U. S. 514

this Court said:

> "It cannot be doubted that the certification operated to transfer the legal title to the State."

It is upon that authority that the Government relied for the bringing of this suit. Paragraph 5 of the complaint has been taken bodily from the opinion of the Court in the Williams case. It in substance says that it was believed the State would convey the land to the Government in accord with the determination of the Courts, but the State of Utah did not re-convey this land to the Government and the United States did nothing whatsoever to obtain such re-conveyance for ten years after the decree of 1914. In the meantime the title of the State became absolute and being absolute, it sold the land to private owners. *It did not flout the decree of the United States District Court or of the United States Circuit Court of Appeals.* The Carbon County Land Company, in an entirely new transaction, bought the land from the State and agreed to pay One Hundred Dollars an acre therefor. The title which the Carbon County Land Company got was a title which had never been litigated. It was the title which the State held ever since the years 1901 and 1904, and which between those years and the year 1924, when this suit was brought, had become invulnerable as against any attack by the Government.

It is submitted that it would be a great wrong for the Government to permit the title to this land to remain vested in the State, so that it could be sold, and then attack that title after sale by the State. The position of the Independent Coal & Coke Company is illustrative of this wrong. It is engaged in the mining of coal. The eleven hundred twenty acres which it acquired were so situated that the Independent Coal & Coke Company was practically compelled to buy, *if that eleven hundred twenty acres was to be the subject of private ownership.* Can it be that this land could be sold time and again, and that

the validity of the title to it should forever depend upon whether the Government saw fit to bring a suit or not?

But the intimation is very strong from the opinion of the Circuit Court of Appeals that the State of Utah could have conveyed this land to someone other than the Carbon County Land Company. The writer does not believe that such an interpretation of the opinion is unjust to the Court of Appeals. If the opinion is correctly interpreted by the writer, then it means that the Carbon County Land Company was in some way or other perpetually enjoined from acquiring this land in *any* transaction, however independent that transaction might have been from the one annulled in the suit of 1907.

It is submitted that if the Government can in this indirect way strike down the State's title the strange incongruity is presented of the State getting a good or bad mortgage, dependent on the party to whom it conveys. And it is further submitted that the Carbon County Land Company can be ignored in and so far as the Independent Coal & Coke Company is concerned, for it seems from the suggestions made by the State in its application to be heard before this Court that the Independent Coal & Coke Company has come into direct relation with the State: (See suggestions of State, R. 3.) and that the Independent Coal & Coke Company has assumed and agreed to pay to the State $112,000 of the mortgage indebtedness due to the State. Surely no one would contend that the invalidity of the State's mortgage could be found from the fact that the State sold the land on February 10, 1920, to the Carbon County Land Company.

It is submitted that this case must be decided on some other ground than that given by the Circuit Court of Appeals if the Government is to prevail. If the State acquired title by the certifications of 1901 and 1904, and if the Statute of Limitations operated in favor of the State upon those certifications, then undoubtedly the State had a title of an indefeasible and invulnerable character on February 10, 1920, when by its patent it conveyed the legal title to these lands to the Carbon County Land Company. Of course, if the State had nothing to convey, then neither the Carbon County Land Company nor any other grantee could get anything whatsoever by reason of the State patent; but it is submitted that the Carbon County Land Company was as capable of acquiring whatever title the State had in a *transaction new and independent* from the contracts annulled in the suit of 1907 as any other party could have been.

The opinion of the Circuit Court of Appeals expressly states that the Government's right of recovery as against the Independent Coal & Coke Company depends upon whether it acquired an interest in the land without notice of the appellants' rights or without value. (R. 34.) This idea, so clearly expressed by the Court of Appeals, absolutely precludes the existence of the idea that the State had nothing to convey. If the State had nothing to convey, then neither a bona fide purchaser nor any other purchaser could ever acquire anything from the State; but that the State did have something to convey is established beyond controversy not only by the opinion of the Court of Appeals, but also by the very existence of this suit itself. If the title held by the State was barren, dry, impotent and non existent, then the State patent is absolutely void, and neither the Carbon County Land Company, the Independent Coal & Coke Company, nor any other person can become possessed of any part or portion of the title to this land through or by means of any act of the State of Utah. If once it is concluded, as the Circuit Court of Appeals did conclude, that the State had title against and upon which a constructive trust could be based, then, if the Statute of Limitations, to-wit: Section 8 of the Act of March 3, 1891, can apply to a certificate, that ends this case in favor of every party defendant to it, including not only Carbon County Land Company but Carbon County itself,—the latter claiming an interest in the land by reason of tax sales. This must be true; otherwise, the whole suit fails as a vain and useless proceeding.

CONTENTION NO. 3.
NO EQUITY IN BILL.

In the lower court we contended that there was no equity in the bill of the Government. It appears that the grantees of the State have relied upon the validity of the title conveyed to them; that they have taken obligations; have paid money, or the equivalent of money, for the land; that they have executed a mortgage to the State; that Carbon County has sold some of the lands for taxes; that the Government has divested itself of its title as early as 1904; that the State has divested itself of its title as early as 1920; that it has a purchase money mortgage for $556,428; that twenty years intervened between the last certification and the commencement of the present suit by the Government. On the face of the records, excepting therefrom the decree of 1914, the ownership of the land was private. It was made the subject of taxation. It was bought and sold. The tax rate of Carbon County was undoubtedly

fixed with reference to this land. Even in the face of these circumstances and of this long delay, the Government in its bill does not offer to do any equity whatsoever. The Government has seen fit to lie idly by for these many years, until the defendants, or some of them, have purchased the land, and then the Government, four years after the patent issued by the State, has brought this action as against the individual purchaser to have that purchaser declared a constructive trustee. By its prayer it has suggested that it will bring a suit against the State in this court to annul the mortgage. If it is necessary to bring such a suit, then that mortgage must have some force and validity. If either a conveyance by the State or a decree against the State and in favor of the Government was necessary in order to divest the State of its title then it must follow that the State had something that it could convey and something that a lapse of time would make perfect.

It is therefore respectfully submitted that whatever defects, if any, there existed in the State's title had been purged from that title by Section 8 of the Act of March 3, 1891, before the State conveyed said title on February 10, 1920. It ought to go without saying that the title of the State was not in any manner affected by the decree rendered in the suit of 1907. The principle that only parties or their privies are affected by decree is too well known to require the citation of authority. The decree rendered in the 1907 suit is obviously not binding on the State and its subsequent grantees.

Brandon v. Ard, 211, U. S. 11.

This Court has with emphasis said that a decree rendered in a suit brought against the grantor after he has parted with title is not binding on the grantee.

Postal Telegraph Co. v. Newport, 247 U. S. 466.

A decree can be res adjudicata only as to matters actually decided or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

This Court has definitely recognized that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a *newly acquired title*.

Barrows v. Kindred, 4 Wall. 399
Merryman v. Bourne, 9 Wall. 592
United States v. Southern Pacific R. R. Co., 223 U. S. 565.

Under these cases the Carbon County Land Company, although a party to this 1907 suit, was within its rights in acquiring a *new* title from the State in 1920.

For these reasons it is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed and that the decision of the United States District Court for the District of Utah should be affirmed.

Respectfully submitted,

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